90-1879

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

MYRA JO COLLINS,
Petitioner,

VS.

THE CITY OF HARKER HEIGHTS, TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Estate of a deceased municipal employee states a claim for relief, pursuant to 42 U.S.C. Section 1983, when it alleges that the decedent's death resulted from the municipality's policy or custom of "deliberate indifference" to decedent's constitutionally protected rights under the Due Process clause of the Fourteenth Amendment to the Constitution of the United States, where the Estate alleges both (1) the municipality's deliberately indifferent policy or custom of failing to train, equip or supervise employees, and (2) a direct causal link between that municipal policy or custom and the constitutional deprivation?

As acknowledged by the Fifth Circuit in this case, there is a direct conflict between the Fifth Circuit's decision in the instant case, 916 F.2d 284, 290-291 (5th Cir. 1990), Appendix at A11-A13, and a recent decision of the Eighth Circuit, *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989).

2. Whether the Texas Hazard Communication Act, which requires all Texas employers (including municipalities) to inform and train their employees concerning workplace safety and to provide appropriate personal protective equipment, creates a substantive due process liberty interest or "entitlement" to be free from the very workplace hazards to which the Estate's decedent succumbed?

In *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 103 L.Ed.2d 249, 258 n.2 (1989), this issue was not reached by the Court because it was not raised below. This question also was not reached by the Court below, although it was properly raised below. 916 F.2d 284, 287-288 n.3 (5th Cir. 1990), Appendix at A6-A7 n.3.

PARTIES TO THE PROCEEDINGS

Counsel of record certify that the following listed persons have a direct interest in the instant case:

1. Myra Jo Collins, Petitioner, who was Plaintiff-Appellant below;

2. City of Harker Heights, Texas, Respondent, who was Defendant-Appellee below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The October 30, 1989 Order of the United States District Court for the Western District of Texas granting Defendant-Respondent's Motion to Dismiss is not published. It is reprinted in the Appendix at A14-A16. The District Court's October 31, 1989 judgment of dismissal is reprinted in the Appendix at A17.

The November 2, 1990 decision of the United States Court of Appeals for the Fifth Circuit, affirming the dismissal, is published at 916 F.2d 284. It is reprinted in the Appendix at A1-A13.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 2, 1990. This Petition for Writ of Certiorari is filed within ninety (90) days therefrom, and

this Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of: (1) Section 1 of the Fourteenth Amendment to the Constitution of the United States and of (2) Section 1983, Title 42 U.S.C. are included in the Appendix at A18.

Relevant provisions of the Texas Hazard Communication Act, Texas Health and Safety Code, Sections 502.002 et seq. (Vernon 1990), are included in the Appendix at A19-A24.

STATEMENT OF THE CASE

Petitioner, Myra Jo Collins ("Collins"), Plaintiff and Appellant below, filed and served her Complaint on June 14, 1989. She alleged under 42 U.S.C. Section 1983 that Respondent, Defendant and Appellee below, the City of Harker Heights, Texas ("the City"), intentionally failed to train its employees and supervisors in, or to inform them of, workplace safety measures mandated by Texas statute and thereby manifested its policy of deliberate indifference to the constitutional rights of its employees. She further alleged that the City's policy of deliberate indifference directly caused the deprivation of her deceased husband Larry Michael Collins' ("the decedent's") substantive due process rights to life and liberty, in violation of the Fourteenth Amendment to the Constitution of the United States.

Collins' Complaint alleges the following facts which must be accepted as true:

(1) In July 1988 the decedent began working for the City in its Sanitation and Sewer Department. His job responsibilities included entering sewer mains through manholes to investigate sewer line problems. Complaint, pp. 2-3, ¶¶ 4-7 (Record at 6-7).

(2) The City provided the decedent no safety training whatsoever. No warnings or instructions were ever communicated or posted to alert him or other employees of the grave

hazards involved in entering the sewer lines; nor were employees instructed on how to protect themselves against these hazards. Although the City owned minimal safety equipment, including air blowers and safety ropes, Complaint, p.3, ¶ 8 (Record at 6), other rudimentary equipment, including gas meters, was lacking altogether, Complaint, p.3, ¶ 9 (Record at 6). Further, the City's employees were not trained or instructed on how to use the available equipment, advised of its importance, nor required or advised to use it. Complaint, p.3, ¶ 8 (Record at 6). The City's supervisors also were not instructed or required to use or have employees use safety equipment or measures. *Ibid.* The City's failure to train or warn violated the express provisions of the Texas Hazard Communication Act. Complaint, p.4, ¶¶ 14-19 (Record at 5). *See* Appendix at A19-A24.

(3) On October 21, 1988, the decedent was instructed by his supervisor to enter a manhole to try to unstop a clogged sewer line. The supervisor, and through him the City, had prior knowledge of the risks. Complaint, p.5, ¶ 2 (Record at 4). He entered the 18 foot manhole without harness, respirator, air blower, gas meter or any other safety device. He lost consciousness, and died of asphyxia due to suffocation (oxygen deprivation) before he could be removed. Complaint, pp. 3-4, ¶¶ 11-12 (Record at 5-6).

(4) The Complaint specifically states that:

1. Prior to October, 1988, the custom, policy and procedure of the City of Harker Heights, Texas was not to train new employees of the dangers of working in sewer lines and manholes. Furthermore, there was a custom to not take any safety equipment to the job site when a manhole or sewer line was to be entered, or if some was taken, it was not used.

2. Prior to October, 1988, the City of Harker Heights was on notice of the dangers to which the employees were exposed because Larry Michael Collins' supervisor had been rendered unconscious in a manhole several months prior to October, 1988, in fact, several months

before Larry Michael Collins began work at the City of Harker Heights.

Furthermore, the Hazardous Communications Act became effective January, 1986, which imposed a burden on the City of Harker Heights to train new employees regarding the dangers of entering a sewer line, to provide the necessary safety equipment and to train the supervisors and employees about its use.

3. There was a custom and policy to not post any type of safety warnings or signs concerning the dangers of entering sewer lines and the dangers of not utilizing their safety equipment.

4. Larry Michael Collins had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees.

5. The need for the training of these employees and the acquisition and use of safety equipment is so obvious, especially in light of the Texas hazardous Communication Act and by such it was so obvious that such a custom and policy resulted in such an inadequacy that it would result in the violation of an employee's constitutional rights—the right to be free from harm and injury resulting in death.

* * *

Causal Connection

The City of Harker Heights' policy and procedure not to train newly hired personnel in the sewer department before they were placed in underground sewer lines and manholes, their [sic] policy and procedure to not train employees in the use of proper safety equipment required by the State law and policy and custom not to require the safety equipment to be on hand or used at the job site were all the cause of the death and deprivation of the constitutional rights of Larry Michael Collins.

Complaint, pp. 5-7 (Record at 2-4).

STATEMENT OF PROCEDURAL HISTORY

On July 7, 1989, the City filed a motion to dismiss Collins' Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for her purported failure to state a claim upon which relief could be granted. Collins filed her Response to the City's motion to dismiss on August 24, 1989; the City filed its Reply on August 30, 1989.

Without hearing or oral argument, on October 30, 1989, the District Court issued its Order dismissing Collins' complaint. Collins filed a Supplemental Brief in opposition to the City's motion to dismiss on October 31, 1989. Judgment was entered on October 31, 1989. Collins timely filed her Notice of Appeal on or about November 16, 1989.

On November 2, 1990, the Fifth Circuit affirmed the judgment of dismissal, expressly on the ground that "pursuant to controlling Fifth Circuit precedent, because an abuse of government power is not implicated, a § 1983 action will not lie." 916 F.2d. at 285, Appendix at A2. The Fifth Circuit further stated that for purposes of a Rule 12(b)(6) motion, although not pleaded expressly:

> an abuse of government power . . . [or] that the City's conduct was of a unique governmental character . . . *was pleaded sufficiently*. But, the controlling and distinguishing factor is that even assuming abuse of government power was pleaded by implication, it cannot be present under any allegation in this action.
>
> 916 F.2d at 290 n.7, Appendix at A11 n.7 (Emphasis added).

In fact, under Texas statute, sewer work is exclusively a governmental function. *See* Civil Practice and Remedies Code, Section 101.0215 (Vernon 1990).

In reaching its decision the Fifth Circuit specifically recognized that its decision and holding, and the Fifth Circuit decisions upon

which it relied, conflicted sharply with a recent decision of the United States Court of Appeals for the Eighth Circuit, *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989). *See* 916 F.2d at 290-291, Appendix at A11-A13.

In their opinions both the Court below and the Eighth Circuit analyzed and relied upon this Court's recent decision in *City of Canton, Ohio v. Harris*, 489 U.S. ____, 103 L.Ed.2d 412 (1989), in which this Court adopted and applied the standard of "deliberate indifference to constitutional rights," and held that certain "failure to train" claims may be asserted under Section 1983 against municipalities by or on behalf of persons who are physically injured by municipal employees acting "under color of State law." In *Ruge* the Eighth Circuit did just the opposite of what the Fifth Circuit did here. Specifically applying the *Harris* decision's "deliberate indifference" standard, the Eighth Circuit *reversed* a district court Order sustaining a Rule 12(b)(6) motion to dismiss a Section 1983 "failure to train" complaint by the estate of a municipal sewer worker against his municipal employer.

In discussing *Ruge*, the Fifth Circuit in the instant case expressly acknowledged that:

> *We are unable to find sufficient shades of difference with the Ruge holding to allow us not to find it conflicts with our controlling precedent. Ruge* might compel [a] finding here that the alleged municipal policy is an abuse of governmental authority or, stated differently, conduct that was of a 'unique governmental character,' sufficient to preclude Rule 12(b)(6) dismissal. We respectfully disagree.
>
> 916 F.2d at 290-291, Appendix at A13 (Footnote omitted; emphasis added).

Furthermore, the Fifth Circuit also observed that:

> [b]ecause our holding is mandated by controlling Fifth Circuit precedent, and because *Ruge*, not this court *created an inter-circuit conflict*, we have not sought *en banc* consideration by this court prior to rendering this decision.
>
> 916 F.2d at 291 n.10, Appendix at A13 n.10 (Emphasis added).

The Fifth Circuit also specifically held that it need not reach the issue of "whether there was a deprivation of a constitutional right" enjoyed by decedent. 916 F.2d at 287, Appendix at A6. This question was reached by the Eighth Circuit in *Ruge* and decided in favor of plaintiff. *See* 892 F.2d at 738. In particular, the Fifth Circuit did not reach the questions whether the Texas Hazard Communication Act (Appendix at A19-A24) conferred upon the decedent an entitlement to be provided with safety measures by his municipal employer nor whether such entitlement would enjoy due process protection as a liberty interest. The Fifth Circuit acknowledged that, unlike the situation before this Court in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 103 L.Ed.2d 249, 258 n.2 (1989), the issue was properly raised below in the Complaint and in briefs and arguments before it. 916 F.2d at 287-288 n.3, Appendix at A6-A7 n.3.

REASONS FOR GRANTING THE WRIT

I

There is a Direct Conflict in the Circuits on the Questions Presented, Which Should be Resolved by this Court

As recognized by the Fifth Circuit in the instant case, the Eighth Circuit's recent decision in *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989), conflicts directly with the decision below and with the Fifth Circuit's earlier decision in *Rankin v. City of Wichita Falls, Texas*, 762 F.2d 444 (5th Cir. 1985).

In *Ruge* the Eighth Circuit relied upon this Court's recent decision in *City of Canton, Ohio v. Harris*, 489 U.S. ____, 103 L.Ed.2d 412 (1989), in which this Court applied the "deliberate indifference to constitutional rights" standard to certain Section 1983 failure to train claims against municipalities. *Ruge*, 892 F.2d at 740. As the *Ruge* Court observed, in *Harris*:

> [This] Court determined that for a policy of a municipality to provide the basis for a violation of substantive due process it must be shown: (1) that the policy is inadequate; (2) the adoption of such a policy reflects a deliberate indifference to

> the constitutional rights of the plaintiff; and (3) the policy caused a violation of the plaintiff's constitutional rights.
>
> *Id.* at 740.

Analyzing these requirements, and specifically relying on the *Harris* decision, the Eighth Circuit held, as to the claims of the estate of a deceased municipal sewer employee: ". . . that a policy, if adopted and proven, that would show a city actively pursued conduct which was deliberately indifferent to the constitutional rights of its citizens [including its employees], would reach constitutional dimensions and be actionable [as state action] under the Civil Rights Act." *Id.* at 742. As the Eighth Circuit held:

> The death of [a municipal employee] while working for the City does not, in itself, violate the constitution. The constitutional violation occurs when his death is caused by an inadequate municipal policy, adopted with its requisite culpability. It is then that an abuse of government authority arises sufficient to state a cause of action under Section 1983.
>
> *Ruge*, 892 F.2d at 741 n. 6.

Unlike the Court below, in *Ruge* the Eighth Circuit also reached the question "whether there was a deprivation of a constitutional right" enjoyed by decedant, and decided that such a deprivation was properly pleaded. *Compare Collins*, 916 F.2d at 267, Appendix at A7 *with Ruge*, 892 F.2d at 738. *See also, Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989) (by implication).

Although conflicting directly with *Ruge*, particularly on the first "Question Presented" herein, the decision in the instant case is a reaffirmation by the Fifth Circuit of its earlier, pre-*Harris* decision in *Rankin v. Wichita Falls, Texas*, 762 F.2d 744 (5th Cir. 1985), which also involved the death of a municipal sewer worker. The decision below also is consistent with and relied on two other Fifth Circuit decisions involving claims by jail detention officers for injuries they suffered *from prisoners* (*Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987) and *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989)) and two such decisions from other Circuits (*Washington v. District of Columbia*, 802

F.2d 1478 (D.C. Cir. 1986) and *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986)). But these four decisions are not truly apposite, as in each of those cases intervening private actors, *i.e.*, prisoners, were the "intervening efficient" cause of each plaintiff's injuries. *See DeShaney v. Winnebago County Department of Social Services*, 489 U.S. ____, 103 L.Ed.2d 249 (1989).

Notably, in *Stoneking v. Bradford School District*, 882 F.2d 720, 724-725 (3rd Cir. 1989), the Third Circuit decided that this distinction was crucial. In *Stoneking*, on remand from this Court for reconsideration in light of *DeShaney* (103 L.Ed.2d 804 (1989)), the Third Circuit reaffirmed a district court's denial of a defendant School District's summary judgment motion, despite *DeShaney*, on the ground that the acts complained of in *Stoneking*, sexual harassment of the student by a teacher, were perpetrated by a state employee, rather than a private person.

The only other Circuit even to have approached squarely addressing the questions raised in this Petition is the Second Circuit, in *McClary v. O'Hare*, 786 F.2d 83 (2nd Cir. 1986). The *McClary* decision, like the Fifth Circuit's decision in *Rankin*, preceded this Court's decisions in *Harris* and *DeShaney*.

In *McClary*, the Second Circuit affirmed the granting of a Rule 12(b)(6) motion to dismiss a Section 1983 wrongful death claim brought by the estate of a county highway department employee against state and county officials. "The actual holding in *McClary* is that the decedent's death was not caused by any established state procedure and therefore did not constitute a constitutional deprivation. 786 F.2d at 87." *Ruge*, 892 F.2d at 741. Lack of foreseeability (which was alleged here and in *Ruge*), was another problem in *McClary*. *See McClary*, 786 F.2d at 87, citing *Parratt v. Taylor*, 451 U.S. 527 (1981).

As correctly explained by the Eighth Circuit in *Ruge*, anticipating this Court's decision in *Harris*, the *McClary* Court stated that:

> . . . we by no means intend to exclude grossly negligent, reckless, or intentional abuse of *governmental* authority from the purview of Section 1983. . . . Nor do we view this decision as a grant of immunity to government employers acting as such. Where harms caused by government employers to

> their employees are attributable to the abuse of the government's authority rather than to an ordinary tort, such harms would continue to be actionable under Section 1983.
>
> *McClary*, 786 F.2d at 89 n.6.

The decision below appears inconsistent at least with the implications of a recent Eleventh Circuit decision, *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989). In *Cornelius*, the Eleventh Circuit reversed a district court's granting of defendants' (Town officials') motion for summary judgment. The Eleventh Circuit distinguished *DeShaney* on the ground that the Town officials had created the danger to plaintiff, the Town Clerk, by contracting to obtain inmate labor, accepting inmates assigned to them and undertaking to supervise the inmates while they worked around the Town Hall *in which plaintiff was required by defendants to work*. *Compare Collins*, 916 F.2d at 288-289, Appendix at A8-A9, quoting *Rankin*. By implication, the Eleventh Circuit also applied the *Harris* standard to the facts in *Cornelius*, involving the Section 1983 claim of a municipal employee against the municipality.

The conflicts among the Circuits on the questions here thus are manifested as follows: (1) There is a clear conflict between the decisions of the Fifth Circuit in the instant case and *Rankin* with the decision of the Eighth Circuit in *Ruge*; (2) at least by implication, the Fifth Circuit position also conflicts with those of the Second Circuit in *McClary*, the Eleventh Circuit in *Cornelius* and the Third Circuit in *Stoneking*; (3) on the other hand, *Ruge* conflicts with implications of pre-*Harris* and *DeShaney* decisions in the District of Columbia and Seventh Circuits in *Washington* and *Walker*, and *Ruge* conflicts with implications of the Fifth Circuit's pre-*Harris* and *DeShaney* decisions in *Hogan* and its post-*Harris* and *DeShaney* decision in *de Jesus Benavides*.

Surely the questions presented are ripe for this Court's review.

II

This Case Raises Important Recurring Questions of Federal Constitutional Law that are Unresolved and that Should be Resolved by this Court

The existence of the direct conflict between the Fifth Circuit's decision in this case and the Eighth Circuit's decision in *Ruge* demonstrates that this case raises as yet unresolved questions of the scope of 42 U.S.C. Section 1983, and the nature of the substantive due process rights of municipal employees. The above-recited implicit conflicts among the Circuits demonstrate the lack of resolution as well.

The importance of settling the serious questions presented is obvious, and further demonstrates that they ought promptly to be resolved by this Court. After all, potentially, the rights of tens of millions of public employees are on the line; as are the treasures of tens of thousands of municipalities.

Moreover, further clarification by this Court is necessary generally concerning the reach and applicability of the *Harris* standard. This Court should also decide whether, as held by the Fifth Circuit in the instant case and in *de Jesus Benavides*, this Court's decision in *DeShaney* is intended to preclude government employees from asserting, under Section 1983, essentially any and all possible claims against their employers for job related injuries violative of substantive due process. *Compare, e.g., Ruge, Stoneeking* and *Cornelius*.

If this is to be so, only this Court can explain with finality why the same municipality that can be sued by its employees under Section 1983 for trauma resulting from sexual or racial discrimination or harassment, or for violating its employees' First Amendment or procedural due process rights or state defined property rights (*see, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Board of Regents v. Roth*, 408 U.S. 564 (1972)), cannot be sued under Section 1983 for trauma or death resulting from a municipality's policy or custom of deliberate indifference to the physical safety of its employees.

Significantly as well, other Circuits have taken this Court's "deliberate indifference" standard, as stated in *Harris*, and applied it in divers contexts to delimit a public entity's potential liability under Section 1983. For example, in *Ware v. Unified School District No. 492*, 902 F.2d 815 (10th Cir. 1990), which involved a First Amendment wrongful termination claim, the Tenth Circuit applied *Harris*' "deliberate indifference" standard in assessing "whether the requisite 'direct causal link' exists between the alleged constitutional deprivation and the [school] board's decision, as final policy maker, to fire Ware." 902 F.2d at 817. Applying the *Harris* standard, over sharp dissent, the Tenth Circuit reversed the district court's granting of a directed verdict to the board. Only this Court can settle whether the *Harris* standard has such universal application.

Implicit in the Fifth Circuit's analysis and decision below is the lingering concern, apparently shared by this Court, that allowing complaints, such as the one in the instant case, under Section 1983 improperly would federalize common law torts and trivialize federal constitutional protections. *See, e.g.*, 916 F.2d at 288-290, Appendix at A8-A11. *See also, Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986); *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986). As the Eighth Circuit's *Ruge* decision makes plain, strict application of the *Harris* "deliberate indifference" standard is sufficient protection from any such tendency and strikes the proper balance between protection of federal constitutional rights and avoidance of federalizing the common law of tort.

Given the conflict among the Circuits and continued confusion as to this Court's intentions, only this Court can give proper meaning to its observation that:

> More important, the difference between one end of the spectrum—negligence—and the other end—intent—is abundantly clear. See O. Holmes, The Common Law 3 (1923). In any event, we decline to trivialize the Due Process Clause in an effort to simplify constitutional litigation.
>
> *Daniels v. Williams*, 474 U.S. 327, 335 (1986).

Finally, only this Court can properly decide the important question reserved by this Court in *DeShaney*, 103 L.Ed.2d at 258 n.2, and not reached by the Court below, 916 F.2d 287-288 n.3, Appendix at A6-A7 n.3, but squarely before the Court here, *i.e.*, whether the Texas Hazard Communication Act gave decedent "an entitlement to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation under our decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972)." 103 L.Ed.2d at 258 n.2.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: January 28, 1991

Respectfully submitted,

SANFORD JAY ROSEN
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APPENDIX

Myra Jo Collins,
Plaintiff-Appellant,

v.

The City of Harker Heights, Texas,
Defendant-Appellee.

No. 89-8029.

United States Court of Appeals,
Fifth Circuit

Nov. 2, 1990.

Widow of city sewer worker, who entered manhole to clear line and died of asphyxia before he could be removed, brought civil rights suit against city. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., dismissed for failure to state claim, and widow appealed. The Court of Appeals, Barksdale, Circuit Judge, held that city sewer worker did not die as a result of any abuse of government power, and thus, widow could not maintain § 1983 action against city.

Affirmed.

1. Civil Rights

City sewer worker, who was instructed to enter manhole to clear a line and who died of asphyxia before he could be removed, did not die as a result of any abuse of government power and, thus, widow of worker could not maintain § 1983 action against city. 42 U.S.C.A. § 1983.

2. Civil Rights

Mere negligence is insufficient to establish municipal liability under § 1983. 42 U.S.C.A. § 1983.

3. Civil Rights

In suit against municipality, as employer, under § 1983 for alleged failure to train employee, showing of direct causal link between municipal policy or custom and alleged constitutional

deprivation is not sufficient in itself; a separate standard of "abuse of government power" must also be satisfied. 42 U.S.C.A. § 1983.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, DAVIS, and BARKSDALE, Circuit Judges.

BARKSDALE, Circuit Judge:

Myra Jo Collins appeals the Fed.R.Civ.P. 12(b)(6) dismissal of her § 1983 action, which alleges that the failure of the City of Harker Heights, Texas, to adequately train its employees was a policy of deliberate indifference to her deceased husband's constitutional rights. Pursuant to controlling Fifth Circuit precedent, because an abuse of government power is not implicated, a § 1983 action does not lie. Accordingly, we AFFIRM.

I.

According to Collins' complaint, her husband began working in July 1988, for the City in its sanitation and sewer department, including entering sewer mains through manholes when there was a sewer line problem. In October 1988, as instructed, he entered a manhole to clear a line and died of asphyxia before he could be removed.

Collins alleged that: her husband's death was caused by the City's policy of not providing safety training to its employees; there was a custom for safety equipment to either not be taken to, or used at, the job site; no warnings or instructions were given on the hazards in entering sewer lines or how to protect against them; several months before her husband's death, his supervisor entered a manhole and was rendered unconscious, placing the City on notice of the risks in sending its employees into the lines; the City systematically and intentionally failed to provide the equipment, training or instruction required by the Texas Hazard Communications Act; and, *inter alia*, this pattern of behavior by the City was

a custom and policy of deliberate indifference to the Fifth and Fourteenth Amendment rights of its employees.[1]

The district court granted a Rule 12(b)(6) dismissal, expressly taking into consideration the applicable causation standard ("deliberate indifference to constitutional rights") set by *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 57 L.Ed. 1232 (1989), but noting that an "abuse of governmental power" was lacking, stating first:

> The question of a government policy demonstrating deliberate indifference toward the rights or well being of its citizens through a failure to train is normally dealt with in an entirely different context. Usually the issue is associated with decisions made by law-enforcement, prison or social services officials. In this case the deceased was not in the custody of the [City], he was an employee.

(Citations omitted.) It next ruled that a municipality's improper action against its employee does not constitute *ipso facto* deprivation of a constitutional right; and held that because a constitutional right had not been violated, an action under § 1983 could not lie.

II.

The question presented in this case is whether a plaintiff seeking recovery under § 1983 for injury to a governmental employee must demonstrate, *inter alia*, that the conduct in issue was an abuse of *governmental* power. More particularly, does alleged wrongful conduct by government—in its capacity as employer rather than as a governing authority—that deprives its employee of an alleged constitutional right give rise to a § 1983 action? We base our holding on the abuse of government power standard, separate from the constitutional deprivation element or standard. The district court appears to have merged those two standards, which are among those necessary for bringing § 1983

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[1] Collins also pleaded state law claims.

into play here. In reviewing this Rule 12(b)(6) dismissal, we will keep them separate.[2]

Section 1983 provides in relevant part:

> Every person who under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, . . . secured by the Constitutional and laws, shall be liable to the party injured in an action at law. . . .

42 U.S.C. § 1983. In *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that a § 1983 action could lie against a municipality only where it "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or where "constitutional deprivations [occurred] pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Id.* at 690-91, 98 S.Ct. at 2035-36.

Earlier, in *Paul v. Davis*, 424 U.S. 693 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Court rejected the idea that "the Due Process Clause of the Fourteenth Amendment and § 1983 make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims." *Id.* at 699, 96 S.Ct. at 1159. Furthermore, mere negligence is insufficient to establish municipal liability under § 1983. *Daniels v. Williams*, 474 U.S. 327, 330-31, 106 S.Ct. 662, 664-65, 88 L.Ed.2d 662 (1986).

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[2] Of course, in reviewing the dismissal we must accept as true all well-pleaded averments and view them in the light most favorable to the plaintiff; "[w]e may uphold . . . [Rule 12(b)(6) dismissal] only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Baton Rouge Bldg. and Constr. Trades Council v. Jacobs Construction, Inc.*, 804 F.2d 879, 881 (5th Cir.1986); *see also Rankin v. City of Wichita Falls*, 762 F.2d 444, 446 (5th Cir.1985).

As stated fairly recently by the Supreme Court in the above-cited *City of Canton, Ohio v. Harris*, the "first inquiry in any case alleging municipal liability under § 1983 is . . . whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." 109 S.Ct. at 1203. *City of Canton* concerned a § 1983 action for violation of an alleged Fourteenth Amendment right to receive proper medical attention while in post-arrest police custody, arising in part out of inadquate training of the custodial police officers concerning when to summon medical care for a detainee. For such failure to train cases, the Supreme Court noted there was "substantial division among the lower courts as to what *degree of fault* must be evidenced by the municipality's inaction before liability will be permitted" and held that "inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 1204 (emphasis by Court).

City of Canton does not permit all municipal failure to train actions to lie under § 1983, as is reflected by the court's restatement of its holding:

> Consequently, while claims such as [the detainee's]—alleging that the city's failure to provide training to municipal employees resulted in the constitutional deprivation she suffered—are cognizable under § 1983, they can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants.

Id. at 1206. *City of Canton* arises out of the use, or abuse, of government power; the holding springs from a citizen being held in custody after arrest, without the ability to control or choose a necessary course of action and being dependent upon the government to do so. The holding establishes only the degree of fault that must be alleged and proved in § 1983 actions against a municipality in certain failure to train cases; it does not hold that all such cases alleging the requisite causation lie under § 1983. In this Circuit, there is a separate standard that must also be satisfied—an abuse of government power. While this element is in many ways similar to, and often blends with, other necessary

elements for a § 1983 action, such as deprivation of a constitutional right, and springs from the same sources as the deprivation element, it is separate nonetheless.

Keeping the standards in mind, we turn to Collins' complaint, in which she makes the requisite *Monell* and *City of Canton* allegations, charging that the City's "custom and policy of deliberate indifference towards the safety of its employees" violated the constitutional rights of her deceased husband. This notwithstanding, our holding is grounded in the abuse of power standard, which pertains to the decedent's relationship with the City—one of employer and employee, rather than one in which the City, as government, acted against the decedent, as governed. Therefore, it is not necessary to reach another of the standards, or elements, necessary for a § 1983 action—whether there was a deprivation of a constitutional right.[3]

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[3] For such deprivation, the complaint alleges that the decedent "had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City['s] . . . custom and policy of deliberate indifference toward the safety of its employees"; that the obvious need for proper training and use of safety equipment, especially as mandated by the Texas Hazard Communication Act, Tex. Health & Safety Code Ann. § 502.001 et seq. (Vernon 1990), and the concomitant failure to do so, "result[ed] in the violation of an employee's constitutional rights—the right to be free from harm and injury resulting in death." In her initial brief, Collins contends, for example, that "a public employee enjoys a life or liberty interest in freedom from unsafe working conditions"; that the Texas Hazard Communication Act, by "confer[ring] on public as well as private employees the right to be free from hazardous, unsafe working conditions," has "create[d] affirmative rights for all employees in the State of Texas, including municipal employees, . . . a liberty interest in a work place free of the very hazards to which the decedent succumbed"; that "[i]t is well-established that deprivation of a liberty interest created by state statute constitutes a violation of the due process clause of the Fourteenth Amendment, which may be redressed under Section 1983"; and that therefore, "[p]ublic employees in the State of Texas. . . . have a substantive due process liberty interest in a safe workplace." *See, e.g., DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 109 S.Ct. 998, 1003 n. 2, 103 L.Ed.2d 249 (1989) (issue raised but not considered). At oral argument, Collins' counsel stated that this right to a safe workplace was the equivalent of a substantive due process right to life. Because we do not reach this issue, we express no opinion on it.

Collins contends that pursuant to *City of Canton*, her claim is sufficient to withstand Rule 12(b)(6) dismissal. But, as discussed above, Collins reads too much into *City of Canton*. It pertained to cases concerning use of governmental power on the governed, to government qua government, consistent with the reminder in *Daniels* that

> [o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that " 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states,' " *Paul v. Davis*, 424 U.S. 693, 701 [96 S.Ct. 1155, 1160, 47 L.Ed.2d 405] (1976), quoted in *Parratt v. Taylor*, 451 U.S. [527], at 544 [101 S.Ct. 1908, 1917, 68 L.Ed.2d 420].

454 U.S. at 332, 106 S.Ct. at 665. Collins has received payments pursuant to the worker's compensation law of Texas;[4] and we express no opinion whether she might have a cause of action under state law.[5] In any event, and as held repeatedly in controlling precedent in this Circuit, she does not have a § 1983 claim against the City. Such precedent is found, for example, in *Rankin v. City of Wichita Falls*, 762 F.2d 444 (5th Cir.1985); *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir.1987); and *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir.1989) (rendered after *City of Canton* and *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)).

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[4] Needless to say, the receipt of such payments, evidenced, for example, by an affidavit filed with the City's Rule 12 motion, has no bearing on whether under Rule 12(b)(6), a § 1983 action can lie in this instance.

[5] The dismissal included her pendent state law claims.

In *Rankin*, a situation tragically similar to the case at hand, a municipal water treatment plant employee drowned while attempting to save another who had fallen into one of the tanks. The action against the city charged that work site safety defects constituted a municipal custom and practice which caused a deprivation of a constitutional right. This court affirmed the dismissal of the complaint for failing to state a claim under § 1983. Because the case predated *City of Canton's* fixing the causation standard, the court assumed that the complaint sufficiently alleged conduct to meet "whatever standard . . . is necessary to state a constitutional claim under section 1983." 762 F.2d at 447.

However, the court explained that simply alleging, or meeting, a causation standard for cases such as this is not enough to permit an action under § 1983.

> While some degree of government 'fault' is necessary to state a claim under the Constitution, to predicate liability under section 1983 totally on the mere degree of fault would be to convert the due process clause into an ordinary tort statute and to lose sight of the fact that section 1983 is directed at the abuse of power made possible only because the wrongdoer is clothed in the authority of state law.

Id. at 447-448. Accordingly, the court found possible § 1983 liability wanting, "because the existence of the alleged work place defects . . . did not amount to a misuse of government power. . . ." *Id.* at 449. The court further explained this controlling distinction:

> The City acted in this case in a role essentially indistinguishable from the role of a private employer; accordingly, we cannot view the City's failure to redress the patent but possibly severe defects in [the decedent's] workplace as an abuse of government power. [The decedent's] association with the treatment plant is not alleged to have been any less voluntary than his relationship with a private employer would have been. This is not a case in which the government has exercised its power to incarcerate a citizen thereby making him dependent on the care of the state, nor are state representatives alleged to have violated the special obligation

> of government to refrain from intentional violations of constitutional rights.

Id. at 449. The court held that "the plaintiffs have made out at most the abuse of power which any private employer might be guilty, *not the abuse of any particular authority or obligation held by the government*"; that the injury must "be attributed to a misuse of power made possible only because the City is clothed with authority of state law." *Id.* at 447, 449 (emphasis added).[6]

In *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987), also rendered before *City of Canton*, a police officer alleged that city policies allowed a prisoner to seize another officer's gun and shoot the plaintiff officer; that these policies "manifest[ed] deliberate indifference to or conscious disregard" for his safety. This court affirmed the Rule 12(b)(6) dismissal by applying the *Rankin* holding that the complaint failed to allege the requisite abuse of government power.

And, in *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir.1989), decided after *City of Canton*, this court applied the *Rankin* analysis to a § 1983 claim by jail detention officers, injured by inmates during an attempted escape. In doing so, it also applied similar decisions from other Circuits and the then recent decision by the Supreme Court in *DeShaney*, handed down only six days before *City of Canton*. *DeShaney* involved a § 1983 action against a governmental entity and its employees (the government) for child abuse injuries; it was alleged that the government's failure to protect the child from his custodial father constituted a Fourteenth Amendment substantive due process violation. Although, obviously, *DeShaney* did not involve the employment relationship in issue here, it is applicable because it holds that not all injuries arising out of an association or relation-

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[6] In addition to relying on *City of Canton*, Collins attempts to distinguish *Rankin* because it did not address whether the regulations allegedly violated by the municipality created a constitutional right. As discussed earlier, including in note 3, this argument does not concern the controlling issue in this case, abuse of government power; it concerns a separate issue or standard—deprivation of a constitutional right—that we do not reach.

ship with the government give rise to a § 1983 claim, even if all other elements for that claim are present.

One contention in *DeShaney* was that because the government was aware of the danger to the child and took some action to protect him, it acquired a duty to do so in a proper manner, and the failure to do so was an abuse of governmental power that constituted a substantive due process violation. In rejecting the contention, the Court noted it was "true that in certain limited circumstances the Constitution imposed upon the [government] affirmative duties of care and protection with respect to particular individuals," but this arose only

> when the [government] takes a person into its custody and holds him there against his will, [it is then that] the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the [government] by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause . . . In the substantive due process analysis, it is the [government's] affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

109 S.Ct. at 1004-1006 (citations omitted).

Accordingly, this court stated in *Benavides* that *DeShaney* "confirm[ed] the rationale of several of our similar recent cases," including *Rankin* and *Hogan*. 883 F.2d at 387. Based upon the facts in *Benavides*, this court noted that

> prison guards are employees who "enlisted, on terms they found satisfactory, and [who] were free to quit whenever

> they pleased." *Washington [v. District of Columbia]*, 802 F.2d [1478, 1482 (D.C. Cir.1986)]; *Walker [v. Rowe,]* 791 F.2d [507, 511 (7th Cir.), *cert. denied*, 479 U.S. 994 [107 S.Ct. 597, 93 L.Ed.2d 597] (1986)]. We applied the same rationale in *Rankin* when we noted that the plaintiffs' decedent's "association with the [defendant city's] treatment plant is not alleged to have been any less voluntary than his relationship with a private employer would have been."

883 F.2d at 388.

Collins contends that the determinative factor making this a proper post-*City of Canton* § 1983 action is simply that the defendant is "*a governmental body*" (emphasis by Collins); that we should "not . . . focus on the relationship between the public entity and the injured or deceased person"; that the alleged deliberate indifference, without more, constitutes the necessary "abuse of governmental authority"; and that the strict, or high, causation standard fixed by *City of Canton* removes the concerns that lead to establishing the abuse of government power standard. As part of, or alternative to, her contention that the abuse of government power standard employed by *Rankin* and other cases was replaced, or subsumed, by the *City of Canton* causation standard, Collins asserts that even if an abuse of government power must be alleged, she has done so sufficiently for Rule 12(b)(6) purposes, relying, in part, on the recent Eighth Circuit holding in *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir.1989).[7]

In *Ruge*, the § 1983 action alleged that the City had a deliberate policy of not shoring ditches and required employees to work in them without warning of such danger. For Rule 12(b)(6) dismissal, the city urged the court to apply the reasoning from

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[7] Although Collins did not expressly plead an abuse of government power, or plead to the effect that the City's conduct was of a unique governmental character, we find for purposes of our discussion and in light of our standard of review for Rule 12(b)(6) dismissals that this necessary element for a § 1983 action of this type was pleaded sufficiently. But, the controlling and distinguishing factor is that even assuming abuse of government power was pleaded by implication, it cannot be present under any allegation in this action.

Rankin and *McClary v. O'Hare*, 786 F.2d 83 (2nd Cir.1986), "that in an employer-employee relationship where the plaintiff fails to show the state conduct complained of was of a 'uniquely governmental character' there is no abuse of government authority and thus no improper state action." 892 F.2d at 741.

The *Ruge* court, however, distinguished *McClary*, ruling that *McClary* held instead that the death "was not caused by any established state procedure and therefore did not constitute a constitutional deprivation."[8] *Id.* The *Ruge* court discussed, but did not attempt to distinguish, *Rankin*.

Ruge reversed the Rule 12(b)(6) dismissal, holding that "an abuse of government authority arises sufficient to state a cause of action under section 1983," when a death, including of a municipal employee, is caused by an inadequate municipal policy, adopted with the requisite culpability." *Id.* at 741 n. 6. In so holding, the court stated:

> However, where the state simply commits a tort, there is no misuse of government power when "the event, however tragic, was an accident neither the occurrence of which nor the particular victim of which could have been predicted." *McClary*, 786 F.2d at 87. We deem a policy, if adopted and proven, that would show a city *actively pursued* conduct which was deliberately indifferent to the constitutional rights of its citizens, would reach constitutional dimensions and be actionable under the Civil Rights Act. *See City of Canton*, 109 S.Ct. at 1204.

Id. at 742 (emphasis added).

We are unable to find sufficient shades of difference with the *Ruge* holding to allow us to not find it in conflict with our controlling precedent.[9] *Ruge* might compel finding here that the alleged municipal policy is an abuse of government authority or, stated differently, conduct that was of a "uniquely government character," sufficient to preclude Rule 12(b)(6) dismissal. We respectfully disagree. Furthermore, we are bound by our controlling Fifth Circuit precedent. As demonstrated, it has not been changed by a Supreme Court decision; in fact it is solidified by that Court's decisions.[10]

There was no abuse of government power. This is not an instance "when the state by the affirmative exercise of its powers so restrains an individual's liberty that it renders him unable to care for himself." *DeShaney*, 109 S.Ct. at 1005. It is "not a case in which a government official, because of his unique position as such, was able to impose a loss on an individual." *McClary*, 786 F.2d at 89. Nor was there "a misuse of power made possible only because the City [was] clothed with authority of state law." 762 F.2d at 449. Accordingly, this action cannot lie under § 1983.

III.

The judgment of the district court is AFFIRMED.

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[8] Without expressing an opinion on the *McClary* holding, we do note that the *McClary* court stated:

> Although we hold that reckless acts of a government employer that harm employees do not give rise to a substantive due process violation as long as the challenged conduct is not *uniquely governmental in character*, we by no means intend to exclude grossly negligent, reckless, or intentional abuses of *governmental* authority from the purview of section 1983. (Citations omitted). Nor do we view this decision as a grant of immunity to government employers acting as such. Where harms caused by government employers to their employees are attributable to the abuse of the government's authority rather than to an ordinary tort, such harms would continue to be actionable under § 1983.

786 F.2d at 89 n. 6 (emphasis added).

[9] As emphasized in the passage quoted above, one difference might be its seeming to include the requirement that the city "actively pursue" deliberately indifferent conduct. 892 F.2d at 742.

[10] Because our holding is mandated by controlling Fifth Circuit precedent, and because *Ruge* not this court, created an inter-circuit conflict, we have not sought en banc consideration by this court prior to rendering this opinion.

In The United States District Court
for The Western District of Texas
Waco Division

Myra Jo Collins,
Plaintiff,

v.

The City of Harker Heights, Texas,
Defendant.

Civil No. W-89-CA-168
[Filed Oct. 30 1989]

ORDER

On this day came on to be considered the Defendant's motion for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) in the above-styled and numbered cause. The Court, having considered the motion, is of the opinion that it is meritorious and should be granted.

Plaintiff is the widow of Larry Michael Collins, a former employee of the City of Harker Heights, Texas. Mr. Collins died on October 21, 1988 when he was asphyxiated by poisonous gases while working in a sewer line. Plaintiff brings suit under 42 U.S.C. § 1983, alleging that her husband's death resulted from the Defendant's violation of his federally protected constitutional rights. Plaintiff contends that Defendant's failure to train and warn its employees of the dangers associated with working in a sewer line represented a conscious indifference to her husband's constitutionally protected rights. Plaintiff further alleges that the conduct of Defendant establishes a policy or custom of placing its employees in deadly situations without proper safety precautions. Defendant has filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted.

A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Kaiser Aluminum and Chemical Sales, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) quoting 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 at 598 (1969). It is well settled that "a complaint should not be

dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Boudeloche v. Grow Chemical Coatings Corps.*, 728 F.2d 759, 762 (5th Cir. 1984); *Kaiser*, 677 F.2d at 1050. When considering such a motion, the complaint must be liberally construed in the plaintiff's favor, and all facts pleaded in the complaint should be accepted as true. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986).

In order for a claim to exist pursuant to 42 U.S.C. § 1983 it is necessary that the Plaintiff be deprived of a federally protected right by a person acting under color of state law. A municipality can be held liable under § 1983 "when the execution of the government's policy or custom . . . inflicts the injury." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). It is not necessary that the government policy or custom be reduced to a written procedure. It is enough that the act which inflicts the injury be representative of official policy. *Id.* at 694.

The first question in any case alleging municipal liability under § 1983 is whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation. *City of Canton, Ohio v. Harris*, ____ U.S. ____, 109 S.Ct. 1197, 1203 (1989). Only when a municipality's failure to train its employees evidences a "deliberate indifference" can such a shortcoming be considered a city "policy or custom" that is actionable under § 1983. *Polk County v. Dodson*, 454 U.S. 312, 326 (1981).

The degree of culpability required to find a violation of due process cognizable under § 1983 is something more than a negligent act. The Due Process Clause is simply not implicated by negligence or the mere lack of due care of an official causing unintended injury or loss of life, liberty or property. *Daniels v. Williams*, 474 U.S. 327, 328-329, 106 S.Ct. 662, 663 (1986). Failure to train employees can only serve as the basis for liability under § 1983 when it amounts to a deliberate indifference to the rights of pesons effected and when that failure to train is the moving force behind the constitutional violation. *City of Canton*, ____ U.S. ____, 109 S.Ct. at 1205.

In this case the Plaintiff has alleged that the Defendant acted with deliberate indifference. The question of a government policy demonstrating deliberate indifference toward the rights or well being of its citizens through a failure to train is normally dealt with in an entirely different context. Usually the issue is associated with decisions made by law-enforcement, prison or social services officials. (*See City of Canton, Ohio v. Harris*, ____ U.S. ____, 109 S.Ct. 1197 (1989); *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986); *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).) In this case the deceased was not in the custody of the Defendant, he was an employee. The Second Circuit has held that even deliberate exposure of public employees to a "high risk" does not violate the constitution because it is not an abuse of governmental power. *McClary v. O'Hare*, 786 F.2d 83 at 88 (2nd Cir. 1986). Improper actions by an employer do not violate the employee's constitutional rights simply because the employer is a governmental official. *Id.* at 89. In this case the acts of the Defendant's superintendent as alleged by the Plaintiff do not amount to a deliberate indifference as to a constitutionally protected right, which is required to find the city liable under § 1983. Accordingly,

IT IS ORDERED that the Motion of Defendant City of Harker Heights to Dismiss is GRANTED.

SIGNED this 30th day of October, 1989.

WALTER S. SMITH, JR.
Walter S. Smith, Jr.
UNITED STATES DISTRICT
JUDGE

In The United States District Court
for The Western District of Texas
Waco Division

Myra Jo Collins,
Plaintiff,

v.

The City of Harker Heights, Texas,
Defendant.

Civil No. W-89-CA-168
[Filed Oct. 31, 1989]

JUDGMENT

In accordance with the Order of this Court entered on this day granting Defendant's Motion to Dismiss, the Court enters its Judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's cause of action is DISMISSED.

SIGNED this 31st day of October, 1989.

WALTER S. SMITH, JR.
Walter S. Smith, Jr.
UNITED STATES DISTRICT
JUDGE

Constitutional Provisions and Statutes

Fourteenth Amendment to the Constitution of the United States

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

Texas Hazard Communication Act, Health and Safety Code (Vernon 1990):

§ 502.002. Findings; Purpose

(a) The legislature finds that:

(1) the health and safety of persons living and working in this state may be improved by providing access to information regarding hazardous chemicals to which those persons may be exposed during normal employment activities, during emergency situations, or as a result of proximity to the manufacture or use of those chemicals; and

(2) many employers in this state have established suitable information programs for their employees and that access to that information is required of all manufacturing employers under the federal Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard.

(b) It is the intent and purpose of this chapter to assure that, if the OSHA standard is not in effect, accessibility to information regarding hazardous chemicals is provided to:

(1) employees who may be exposed to those chemicals in manufacturing or nonmanufacturing employer workplaces;

(2) emergency service organizations responsible for dealing with chemical hazards during an emergency; and

• • •

§ 502.003. Definitions

In this chapter:

* * *

(9) "Employee" means a person who may be or may have been exposed to hazardous chemicals in the person's workplace under normal operating conditions or foreseeable emergencies, and includes a person working for this state, a person working for a political subdivision of this state, or a member of a volunteer emergency service organization. The term does not include an office worker, a ground maintenance worker, security personnel, or nonresident management unless the person's job performance routinely involves potential exposure to hazardous chemicals.

(10) "Expose" or "exposure" means that an employee is subjected to a hazardous chemical in the course of employment through any route of entry, including inhalation, ingestion, skin contact, or absorption. The term includes potential, possible, or accidental exposure.

* * *

(12) "Hazardous chemical" means an element, chemical compound, or mixture of elements or compounds that is a physical hazard or health hazard as defined by the OSHA standard in 29 CFR Section 1910.1200(c), or a hazardous substance as defined by the OSHA standard in 29 CFR Section 1910.1200(d)(3).

* * *

(16) "Nonmanufacturing employer" or "employer" means an employer with a workplace in Standard Industrial Classification (SIC) Codes 46-49 (pipelines, transportation services, communications, and electric, gas, and sanitary services), 51 (wholesale trade, nondurable goods), 75 (automotive repair, services, and garages), 76 (miscellaneous repair services), 80 (health services), 82 (educational services), and 84 (museums, art galleries, and botanical and zoological gardens); this state and its political subdivisions;

and volunteer emergency service organizations. If the OSHA standard is not in effect, "employer" also includes manufacturing employer.

* * *

§ 502.010. Employee Education Program

(a) An employer, shall provide, at least once a year, an education and training program for employees who use or handle hazardous chemicals.

(b) Not later than the 30th day after an employer provides an education and training program, the employer shall report to the commissioner that the program has been provided to the employees.

(c) An employer shall provide additional instruction to employees when the potential for exposure to hazardous chemicals changes or when the employer receives new and significant information concerning the hazards of a chemical.

(d) An employer shall provide training to a new or newly assigned employee before the employee works with or in a work area containing a hazardous chemical.

(e) An employer shall keep a record of the dates of training sessions given to employees.

(f) An education and training program must include, as appropriate:

(1) information on interpreting labels and MSDSs and the relationship between those two methods of hazard communication;

(2) the location, acute and chronic effects, and safe handling of hazardous chemicals used by the employees;

(3) protective equipment and first aid treatment to be used with respect to the hazardous chemicals used by the employees; and

(4) general safety instructions on the handling, cleanup procedures, and disposal of hazardous chemicals.

(g) As part of an outreach program created in accordance with Section 502.009, the commissioner shall develop an education and training assistance program to assist employers who are

unable to develop the programs because of size or other practical considerations. The program shall be made available to those employers on request.

* * *

§ 502.013. Employee Notice; Rights of Employees

(a) An employer shall post adequate notice, at locations where notices are normally posted, informing employees of their rights under this chapter. If the commissioner does not prepare the notice under Section 502.009, the employer shall prepare the notice.

(b) Employees who may be exposed to hazardous chemicals shall be informed of the exposure and shall have access to the workplace chemical list and MSDSs for the hazardous chemicals. Employees, on request, shall be provided a copy of a specific MSDS with any trade secret information deleted. In addition, employees shall receive training concerning the hazards of the chemicals and measures they can take to protect themselves from those hazards. Employees shall be provided with appropriate personal protective equipment. These rights are guaranteed.

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